FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 15-11

IGOR OVCHINNIKOV, ET Al

v.

MICHAEL HITRINOV ET AL

RESPONDENTS' REPLY TO COMPLAINANTS' MOTION FOR GENERAL APPEARANCE

Pursuant to Rules 69 and 71, Specially-Appearing Respondents hereby reply to Complainants' motion to require Specially-Appearing Respondents to file a general appearance. Although Specially-Appearing Respondents are entitled to seven days in which to respond under Rule 71, we file today in the interest of securing a "just, speedy, and inexpensive determination" of this proceeding. See FMC Rule 1.

On April 29, Complainants filed what purported to be an opposition to Respondents' Motion to Consolidate the two essentially identical Complaints in Dockets 15-11 and 1953(I). Hidden inside that "opposition," however, is a request inserted by Complainants for entirely different relief – "that Respondents now be precluded from contesting the issue of service." Such a request for ruling is by definition is a "motion" to which are entitled by Rule to Reply. See Rules 69(a); (71).

Although Complainants' entirely inappropriate motion could, and should, be denied on procedural grounds of being improperly filed and failing to identify conferral with opposing counsel, we show below that it is in any event specious as a matter of substance.

We fully understand why Complainants wish to deprive Specially-Appearing Respondents of their right to challenge service of process – they are very much aware that, as Specially-Appearing Respondents will demonstrate in their forthcoming Motion to Dismiss, Specially-Appearing Respondents have not been served as required in accordance with FMC Rule 113and F.R.C.P. 4, so the Commission lacks personal jurisdiction over Specially-Appearing Respondents.

As the Presiding Officer is aware, Specially-Appearing Respondents filed a Special Appearance in this proceeding, as authorized by Commission Rule 21, for the specific purpose of filing a challenge to service, if needed after ruling on their Motion for Stay. In granting Specially-Appearing Respondents' Motion for Extension in part, however, the Presiding Officer ordered that Specially-Appearing respondents file their Motion to Dismiss concurrently with their Answer and Response to Order to Show Cause (and now certain Shipping Documents). In the interest of a just and speedy resolution, Specially-Appearing Respondents were prepared to submit the pleadings under a reservation of rights, rather than stand on their Constitutional right to demand that the issue of service be resolved beforehand. See, e.g., *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.* 549 U.S. 422, 430-31 (2007) ("a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over . . . the parties (personal jurisdiction")); *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 940 (11th Cir. 1997) ("courts should address issues relating to personal jurisdiction before reaching the merits of a plaintiff's claims. A defendant that is not subject to the jurisdiction of the court cannot be bound by its rulings").

Complainants' motion, however, puts Specially-Appearing Respondents in an untenable position, as, in Complainants' eyes, compliance with the Presiding Officer's Orders would place

them in jeopardy of waiving a meritorious defense, even under a reservation of rights. Accordingly, absent assurance that the Answer, Response, and Shipping Documents may be filed under a reservation of rights, Specially-Appearing Respondents may not properly be required to file such pleadings/documents until the Presiding Officer has ruled on their Motion to Dismiss.

To the extent, if any, that Complainants' motion is predicated on papers previously filed, it is patently specious. Everything that Specially-Appearing Respondents have filed has been specifically designated as according to its special appearance, and addressed solely to the effectuation of its right to a ruling on its motion to dismiss. Specially-Appearing Respondents' first motion – for an extension of time, was explicitly within the Special Appearance, as was its motion for stay. It can hardly be gainsaid that a motion to consolidate is intimately connected with the motion to dismiss, as it's express purpose was to allow the filing of one motion, rather than two. As Specially-Appearing Respondents have not yet filed anything on the merits or otherwise suggesting that they submit to the personal jurisdiction of the Commission, there is simply no basis for requiring a general appearance.[1]

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[1] The sole case cited by Complainants – *Nationwide Engineering & Control Systems, Inc. v. Thomas*, 837 F.2d 345 (8th Cir. 1988), is inapt both legally and factually. As Complainants fail to disclose, the snippet they quote is not from the Eight Circuit, but rather from an Iowa court. This is not surprising given that the issue of jurisdiction arose under Iowa, not federal, law. The snippet is also directly contrary to FMC Rule 21(c), which authorizes a Special Appearance as to "questions or issues." Moreover, the full quote on page 347 reveals that under Iowa law, even a challenge to subject matter jurisdiction is waived by filing an answer, the direct opposite of federal law. On a factual basis, the party in *Nationwide Engineering* filed not just a few procedural motions necessary to obtain a ruling on jurisdiction, but an actual answer and affirmative defenses, apparently with no reservation of rights. The sole relevance of this case is to illustrate why, given Complainants' position, Respondents may not file an Answer or Response to Order to Show Cause absent either (1) a prior ruling on their Motion to Dismiss or (2) a denial of Complainants' motion that makes clear Respondents may safely file such documents under a reservation of rights.

CONCLUSION

For the foregoing reasons, Respondents request that the pseudo-motion of Complainants be denied.

Respectfully submitted,

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